

1 **IN THE UNITED STATES DISTRICT COURT**  
2 **FOR THE DISTRICT OF PUERTO RICO**

3 PLAZA REALTY OF RIO PIEDRAS,  
4 INC.,

5 Plaintiff

6 v.

7 MR. SERGIO GABRIEL SELCER, ET AL

8 Defendants

Civil No. 10-1321 (SEC)

9 **OPINION and ORDER**

10 Pending before this Court is Defendants Sergio Gabriel Selcer and Mindy Feinberg's  
11 (collectively "Defendants") motion to dismiss (Docket # 9), and Plaintiff Plaza Realty of Rio  
12 Piedras, Inc.'s ("Plaintiff") opposition thereto (Docket # 10). After reviewing the filings, and  
13 the applicable law, Defendants' motion to dismiss is **DENIED**.

14 **Factual and Procedural Background**

15 On April 16, 2010, Plaintiff filed the present suit under diversity jurisdiction, for breach  
16 of contract claim and damages.<sup>1</sup> According to Plaintiff, Defendants "willfully, negligently,  
17 maliciously and in bad faith concealed information" regarding the status of the lease contracts  
18 and rent rolls pertaining to the property Plaintiff purchased from Defendants.

19 Pursuant to the complaint, on July 3, 2008, Plaintiff and Defendants entered into an  
20 Option to Purchase Agreement ("Option Agreement"),<sup>2</sup> whereby Plaintiff obtained the option

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22 <sup>1</sup> Under the Civil Code of Puerto Rico's Article , P.R. Laws Ann. tit. 31, § 3018, "those who  
23 in fulfilling their obligations are guilty of fraud, negligence, or delay, and those who in any manner  
24 whatsoever act in contravention of the stipulations of the same, shall be subject to indemnify for the  
losses and damages caused thereby."

25 <sup>2</sup> The parties to the Option Agreement are Cinemas Management of Puerto Rico, Inc. and  
26 Defendants. In accordance with the complaint, Cinemas is a company that provides management and  
operation services to commercial real estate companies, including Plaintiff.

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3 to purchase a property owned by Defendants which consists of a “strip style shopping center”  
4 comprised of both commercial space and free standing units, located in San Juan, Puerto Rico.

5 Some of Plaintiff claims hinge on Defendants’ alleged breach of its obligations stemming  
6 from Section “O” of the Option Agreement.<sup>3</sup> Plaintiff also points to a catchall obligation  
7 contained in the “Deed of Purchase and Sale” (“Deed”), which states in pertinent part that “there  
8 are no material facts or circumstances, related to the title, use, condition, or operation of the  
9 Realty, which Seller has not disclosed to the purchaser.”According to Plaintiff, this was an  
10 essential condition of the contract of sale. Plaintiff alleges that, notwithstanding the above,  
11 Defendants made fraudulent misrepresentations about three tenants: Encantos Restaurants,  
12 owner of the Taco Bell franchise of Puerto Rico; Don Pedro BBQ; and Subway Restaurants.<sup>4</sup>  
13 Accordingly, Plaintiff contends that the rent rolls, estoppel certificates provided by the tenants,  
14 and other documents Defendants supplied in compliance with the Option Agreement failed to

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17 <sup>3</sup> Under Section “O” of the Option Agreement, Defendants had the following obligations that  
18 are material to the present suit: 1) “to obtain from the lessee an estoppel certificate in a form mutually  
19 agreed to by the Parties, as to the effects to confirm such lessee’s commitment to comply with its  
20 corresponding Lease, and deliver them to the Purchaser on the closing date;” 2) “continue to operate  
21 the Shopping Center in the normal course of business, including renewing leases, executing new leases,  
22 and exercises any right granted by law or established in a lease in the event of a default by a Tenant;”  
23 3) to notify the Purchaser and keep the Purchaser informed of any changes regarding any current lease  
24 of the Commercial Spaces or Free Standing Units and the Seller shall consult the Purchaser the terms  
25 of any new leases of the Commercial Spaces or Free Standing Units prior to its execution.” See Docket  
26 # 10-1, p. 16.

23 <sup>4</sup> With regards to “Taco Bell,” Plaintiff alleges that Defendants, on October 3, 2008, were  
24 notified of the “critical financial condition that was affecting the Plaza Puerto Rico Taco Bell,” and thus  
25 requested Defendants modify the terms of the Taco Bell lease. As to Don Pedro BBQ, Plaintiff contends  
26 that Defendants had authorized a reduction amounting to \$2,000 of Don Pedro BBQ’s lease. Lastly,  
Plaintiff avers that Defendants reduced Subway Restaurants’ Common Area Maintenance charges by  
\$3.74 per square foot via an oral agreement between Defendants and the tenant.

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3 reflect the economic reality of the purchased property. Plaintiff alleges that, as a result, they  
4 were deceived into acquiring the property at an overstated price.

5 On July 6, 2010, Defendants moved for dismissal pursuant to a forum selection clause  
6 contained in the Option Agreement. Docket # 9. Plaintiff opposed (Docket # 10), Defendants  
7 replied (Docket # 13), and Plaintiff sur-replied (Docket # 16).

### 8 **Standard of Review**

9 Although Defendants invoked FED. R. CIV. P. 12(b)(3) as the procedural vehicle for  
10 urging dismissal under the forum selection clause, the First Circuit has held that such dismissals  
11 are founded on Rule 12(b)(6). Lambert v. Kysar, 983 F.2d 1110, 1112, n. 1 (1st Cir. 1993); see  
12 also Doe v. Seacamp Ass'n, 276 F. Supp. 2d 222, 224, n. 2 (D. Mass. 2003); LFC Lessors v.  
13 Pacific Sewer Maintenance Corp., 739 F.2d 4, 7 (1st Cir. 1984). Therefore, courts have  
14 emphasized that a motion to dismiss based upon a forum-selection clause is considered as one  
15 alleging failure to state a claim for which relief can be granted, under Rule 12(b)(6), and not one  
16 for lack of subject-matter jurisdiction. Silva v. Encyclopedia Britannica, Inc., 239 F.3d 385, 386  
17 (1<sup>st</sup> Cir. 2001); Outek Caribbean Dist. V. Echo, Inc., 206 F. Supp. 2d 263, 266 (D.P.R. 2002).

18 To survive a Rule 12(b)(6) motion, Plaintiffs' "well-pleaded facts must possess enough  
19 heft to show that [they are] entitled to relief." Clark v. Boscher, 514 F. 3d 107, 112 (1<sup>st</sup> Cir.  
20 2008).<sup>5</sup> In evaluating whether Plaintiffs are entitled to relief, the court must accept as true all  
21 of their "well-pleaded facts [and indulge] all reasonable inferences therefrom" in the plaintiff's  
22 favor. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964 (2007). The First Circuit has held  
23 that "dismissal for failure to state a claim is appropriate if the complaint fails to set forth factual  
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25 <sup>5</sup> FED. R. CIV. P. 8(a)(2) requires only "a short and plain statement of the claim showing that  
26 the pleader is entitled to relief," in order to allow the defendant fair notice of what the claim is and the  
grounds upon which it rests. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964 (2007).

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3 allegations, either direct or inferential, respecting each material element necessary to sustain  
4 recovery under some actionable legal theory.” Gagliardi v. Sullivan, 513 F. 3d 301, 305(1<sup>st</sup> Cir.  
5 2008). Courts “may augment the facts in the complaint by reference to documents annexed to  
6 the complaint or fairly incorporated into it, and matters susceptible to judicial notice.” Id. at  
7 305-306. However, in judging the sufficiency of a complaint, courts must “differentiate between  
8 well-pleaded facts, on the one hand, and ‘bald assertions, unsupportable conclusions,  
9 periphrastic circumlocution, and the like,’ on the other hand; the former must be credited, but  
10 the latter can safely be ignored.” LaChapelle v. Berkshire Life Ins., 142 F.3d 507, 508 (quoting  
11 Aulson v. Blanchard, 83 F.3d 1, 3 (1<sup>st</sup> Cir.1996)); Buck v. American Airlines, Inc., 476 F. 3d  
12 29, 33 (1<sup>st</sup> Cir. 2007); see also Rogan v. Menino, 175 F.3d 75, 77 (1<sup>st</sup> Cir. 1999). Thus Plaintiffs  
13 must rely in more than unsupported conclusions or interpretations of law, as these will be  
14 rejected. Berner v. Delahanty, 129 F.3d 20, 25 (1<sup>st</sup> Cir. 1997) (citing Gooley v. Mobil Oil Corp.,  
15 851 F.2d 513, 515 (1<sup>st</sup> Cir. 1988)).

16 Therefore, “even under the liberal pleading standards of Federal Rule of Civil Procedure  
17 8, the Supreme Court has recently held that to survive a motion to dismiss, a complaint must  
18 allege ‘a plausible entitlement to relief.’” Rodríguez-Ortíz v. Margo Caribe, Inc., 490 F.3d 92  
19 (1<sup>st</sup> Cir. 2007) (citing Twombly, 127 S. Ct. at 1965). Although complaints do not need detailed  
20 factual allegations, the “plausibility standard is not akin to a ‘probability requirement,’but it  
21 asks for more than a sheer possibility that a defendant has acted unlawfully.” Twombly, 127  
22 S. Ct. At 1965; see also Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). A plaintiff’s obligation  
23 to “provide the ‘grounds’ of his ‘entitle[ment] to relief” requires more than labels and  
24 conclusions, and a formulaic recitation of the elements of a cause of action will not do.”  
25 Twombly, 127 S. Ct. At 1965. That is, “factual allegations must be enough to raise a right to  
26 relief above the speculative level, on the assumption that all allegations in the complaint are

2 true.” Parker v. Hurley, 514 F. 3d 87, 95 (1<sup>st</sup> Cir. 2008).

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4 The Court “may augment the facts in the complaint by reference to documents annexed  
5 to the complaint or fairly incorporated into it, and matters susceptible to judicial notice.”  
6 Gagliardi v. Sullivan, 513 F. 3d 301, 305-06 (1<sup>st</sup> Cir. 2008).

7 **Applicable Law and Analysis**

8 In support of their motion, Defendants argue that this district is an improper venue for  
9 the present claims. According to Defendants, pursuant to Section “Q” of the Option Agreement,  
10 the proper forum for any suit arising out of said agreement is the Superior Court of Puerto Rico,  
11 San Juan Section. On this point, Defendants aver that the intent of the parties and the clear  
12 language of the contract’s provision disallow a different interpretation.

13 In opposition, Plaintiff argues that its causes of action stem from Defendants’ willful,  
14 negligent, malicious and bad faith actions and representations, and breach of the Option  
15 Agreement as well as the Deed. Specifically, Plaintiff contends that insofar as the Deed does  
16 not contain a forum selection clause, the District court is a proper venue to elucidate Plaintiff’s  
17 claim.

18 In their reply, Defendants contend that Plaintiffs’ claims hinge on the alleged violations  
19 of Section “O” of the Option Agreement, thus there are no claims for breach of contract under  
20 the Deed. Even so, Defendants insist that the Deed does not contain any obligation requiring  
21 that Defendants divulge any changes regarding the status pertaining to the leases of the  
22 commercial units.

23 Although generally, “there is a strong presumption in favor of the plaintiff’s choice of  
24 forum,” Rafael Rodriguez Barril, Inc. v. Conbraco Indus., No. 08-1993, slip. op. at 8 (D.P.R.  
25 June 30, 2009) (citing Coady v. Ashcraft & Gerel, 223 F.3d 1, 11 (1st Cir. 2000), “when parties  
26 agree to a forum selection clause, it is the resisting party who must show the unreasonableness

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3 of enforcement under the circumstances.” Id. (citing M/S Bremen v. Zapata Off-Shore Co., 407  
4 U.S. 1, 10 (1972)). In analyzing the validity of a forum selection clause, the First Circuit has  
5 “recognized the general importance of enforcing these clauses.” Outek Caribbean, 206 F. Supp.  
6 2d at 270. Furthermore, the court has held that in the context of a motion to dismiss based on  
7 a forum clause, the forum clause is *prima facie* valid, and must be enforced, unless the opposing  
8 party can show the clause to be unreasonable, unjust, or invalid due to fraud. Silva v.  
9 Encyclopedia Britannica, Inc., 239 F.3d 385, 386 (1<sup>st</sup> Cir. 2001); see also Mercado-Salinas v.  
10 Bart Enters. Int’l, 669 F. Supp. 2d 176, 184 (D.P.R. 2009). Therefore, the burden shifts to the  
11 resisting party to show that “the particular clause: 1) was not ‘freely negotiated’ or was the  
12 result of fraud; 2) contravenes a strong public policy of the forum where the suit is brought; or  
13 3) the party challenging its enforceability shows that trial in the contractual forum will be so  
14 gravely difficult that it will, for all practical purposes, be deprived of its day in court.” Marrero  
15 v. Aragunde, 537 F. Supp. 2d 305, 308 (D.P.R. 2008); see also D.I.P.R. Mfg. v. Perry Ellis, 472  
16 F. Supp. 2d 151, 154 (D.P.R. 2007).

17 Courts have held that “[t]he fact that another location would prove more convenient to  
18 the party resisting the agreed upon location is not sufficient to meet the ‘heavy burden’ required  
19 to obviate a forum selection clause.” Antilles Cement Corp. v. Aalborg Portland A/S, 526 F.  
20 Supp. 2d 205, 208 (D.P.R. 2007) (citing Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595,  
21 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991). Otherwise, “forum selection clauses would almost  
22 never be enforceable, for inconvenience to at least one of the parties is an almost forgone  
23 conclusion when dealing with a provision that requires litigating away from one’s home turf.”  
24 Antilles Cement Corp., 526 F. Supp. 2d at 208 (citing In re Mercurio, 402 F.3d 62, 66 (1st Cir.  
25 2005)).  
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3 Additionally, “[a] fundamental question in evaluating the effect to be afforded to a forum  
4 selection clause is whether its language is mandatory or permissible.” Marrero v. Aragunde, 537  
5 F. Supp. 2d 305, 308 (D.P.R. 2008) (citing Autoridad de Energia Electrica v. Ericsson Inc., 201  
6 F.3d 15 (1st Cir. 2001). Whereas a “mandatory clause is one that requires that the litigation be  
7 brought only in the chosen forum, to the exclusion of others... a permissible clause [sic] is one  
8 that allows the parties to litigate in the chosen forum, but does not purport to exclude them from  
9 litigating in some other forum that otherwise has jurisdiction.” Id. (citing Ericsson, 201 F.3d at  
10 19). Courts will ordinarily enforce a forum selection clause that is mandatory. Id.

11 The validity of forum selection clauses has been consistently upheld by the Puerto Rico  
12 Supreme Court, this district, and the First Circuit. Outek Caribbean, 206 F. Supp. 2d at 270;  
13 Silva, 239 F.3d at 386; Perry Ellis Intl., 472 F. Supp. 2d at 155. This precedent is so strong, that  
14 these types of clauses have been implemented even when a Puerto Rico law expressly proscribes  
15 the enforcement of said types of clauses. Perry Ellis Intl., 472 F. Supp. 2d at 155 (citations  
16 omitted). However, courts are hesitant to enforce forum selection clauses unless they clearly  
17 state the parties’ unambiguous intent that the controversy be litigated exclusively in a particular  
18 forum. Mercado-Salinas, 669 F. Supp. 2d at 184-185 (citing Cummings v. Caribe Mktg. & Sales  
19 Co., Inc., 959 F. Supp. 560, 565 n.7 (D.P.R. 1997).

20 This Court first notes that Plaintiff expressly claims that “one of the essential conditions  
21 of the Deed was [Defendants’] representations to Plaza that there were no material facts or  
22 circumstances, related to the title, use, condition or operation of Plaza Puerto Rico that they had  
23 not previously disclosed to Plaza.” Docket # 1, p. 5. Thus they assert that Defendants breached  
24 said contract. Moreover, said Deed does not contain a forum selection clause. Accordingly,  
25 Plaintiff’s claims of breach of contract arising from the Deed exist even absent claims regarding  
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3 the Option Agreement. As such, dismissal of the claims regarding the alleged breach of the  
4 Deed's contractual obligations is unwarranted.

5 On the other hand, there is a forum selection clause in the Option Agreement, which  
6 states that "the parties herein have agreed that this Option shall be governed and construed in  
7 accordance with the laws of the Commonwealth of Puerto Rico, and submit themselves to the  
8 jurisdiction of the Superior Court of Puerto Rico, San Juan Section." Unlike in Rivera v. Centro  
9 Medico de Turabo, Inc., 575 F.3d 10, 17-18 (D.P.R. 2009), here the agreement to submit to the  
10 Superior Court of Puerto Rico, San Juan Section is not preceded and informed by a qualifying  
11 phrase: "all disputes arising out of or relating to this Agreement shall be submitted to the  
12 Superior Court of Puerto Rico." Instead, it is similar to the forum selection clause discussed in  
13 Redondo Constr. Corp. v. Banco Exterior de Espana, S.A., 11 F.3d 3 (1st Cir. 1993), where the  
14 Court held that "language providing that each [party] hereby expressly submits to jurisdiction  
15 of all Federal and State Courts located in the State of Florida was permissive," and did not  
16 negatively exclude any other proper jurisdiction. See Ericsson, Inc., 201 F.3d at 18. This  
17 difference is determinative in concluding that the forum selection clause found in the Option  
18 Agreement is permissive. The present parties merely consented for the Superior Court of Puerto  
19 Rico, San Juan Section to exert jurisdiction over the parties in relation to causes of action  
20 stemming from the Option Agreement; however, the parties did not negatively exclude the  
21 proper jurisdiction of other courts. As such, Defendants' arguments on this front fail.

22 Considering that the forum selection clause is permissive in nature, and that Defendants  
23 have failed to show that this venue is improper because the forum selection clause contained  
24 in the Option Agreement: 1) was not 'freely negotiated' or was the result of fraud; 2)  
25 contravenes a strong public policy of the forum where the suit is brought; or 3) the party  
26 challenging its enforceability shows that trial in the contractual forum will be so gravely



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3 difficult that it will, for all practical purposes, be deprived of its day in court; ” the court is not  
4 obligated to enforce said clause. Marrero v. Aragunde, 537 F. Supp. 2d 305, 308 (D.P.R. 2008);  
5 see also Perry Ellis, 472 F. Supp. 2d at 154.

6 **Conclusion**

7 Based on the foregoing, Defendants’ motion to dismiss is **DENIED**.

8 **IT IS SO ORDERED.**

9 In San Juan, Puerto Rico, this 16<sup>th</sup> day of December, 2010.

10 *S/Salvador E. Casellas*  
11 Salvador E. Casellas  
12 U.S. Senior District Judge  
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